HOST CENTERED TO MUTUAL COMPROMISE: A COMPARATIVE ANALYSIS OF THE INDIAN MODEL BIT AND INDIA-BRAZIL INVESTMENT COOPERATION AND FACILITATION TREATY

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ABSTRACT

India’s progression from the ambiguous 2003 Model BIT to the unequivocal 2016 model signified a shift in its approach to investment treaties from an investor-friendly model to a host-centric model. Amidst this novel investment landscape, this paper seeks to critically trace the shift in the paradigm structure of BITs. The conflicting themes analysed in this paper, first examines the 2016 provisions aimed at protecting the interest of the host state and correlates these provisions to those in the India-Brazil Investment Cooperation and Facilitation Treaty (ICFT) which contravenes the purpose of the 2016 Model. The ICFT is also distinctive for being India’s first digression from the 2016 Model. The paper chiefly seeks to analyse how analogous the 2016 Model BIT is to the 2020 India- Brazil treaty.
I. Introduction

A BIT is a treaty between two sovereign states which aims at protecting investments made by investors of both states.¹ The United Nations Conference on Trade and Development (UNCTAD) has termed BITs as the most important protection for international investments offering paramount protections to foreign investors across jurisdictions as they serve as international regulatory mechanisms between the two states in order to protect, regulate and promote investments.² BITs impose conditions on the host states regulatory functions in order to protect foreign investments from excessive intervention by the host state.³ The conditions in BITs regulate a multitude of activities viz. restricting host states from adopting measures which result in expropriation of foreign investment, creating an obligation on host states to accord fair and equitable treatment (FET) to all foreign investments, preventing host states from engaging in discriminatory behaviour or applying arbitrary policies to foreign investment, permitting fund transfers in accordance with the treaty provisions, etc.⁴ However, the most important function of BITs is that they provide individual investors with a platform to advance claims and file lawsuits against host states if their regulatory activities are inconsistent with the framework of the BIT.

Owing to economic liberalization in 1991, India signed its first BIT in 1994⁵ with the intention of attracting and incentivizing increased foreign investment. India’s first BIT model was based on the model created and followed by the United Kingdom which consisted of detailed substantial and procedural provisions framed to protect foreign investment over the regulatory

² Id. at 83.
powers of the host state. The 2003 Model BIT bore close semblance to the UK model and between 1994 and 2011 India signed over 80 BITs. The proliferation in BITs and increased foreign investment in India are indicative of the rapid pace of the amalgamation of the Indian economy with the global economy which resulted in increased BIT claims against India.

II. Tracing India’s Bilateral Investment Treaty from the 2003 Model to the 2016 Model:

The most notable development in BITs was the shift from the 2003 model to the 2016 model, this stemmed from the White Industries (WI) v. India award in 2011. The WI award substantially changed the landscape of investment treaty law in India. In 2002, WI, an Australian company was meted out an arbitral award in its favour as per the International Chamber of Commerce Arbitration Rules against Coal India (CI), an India public sector company. This award arose from a contractual dispute and WI sought to enforce the award before the High Court of Delhi, whereas CI sought to set the award aside before the High Court of Calcutta. CI’s request was granted, upon which WI appealed to the Supreme Court of India. However, ultimately the matter was not adjudicated upon. Eventually in 2010, citing inordinate delay due to the Indian judicial system, WI took the matter to arbitration. The tribunal awarded WI 4 million Australian dollars and ruled that India violated the Most Favoured Nation (MFN) provision of the India-Australia BIT. Pursuant to the award, ensued innumerable claims against India challenging various measures.

In the same year India lost the BIT case the Ministry of Commerce prepared a discussion paper titled “International Investment Agreements Between India and Other Countries”, where it identified areas of concern, mainly the widely worded provisions of the 2003 Model BIT which

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6 Prabhash Ranjan, India and Bilateral Investment Treaties - A Changing Landscape, 29 (2) ICSID Rev. 1, 2-3 (2014).  
7 Ranjan, supra note 4, at 14.  
left much to arbitral discretion.\textsuperscript{10} The draft report of the current BIT was open for comments in 2015 and was subsequently adopted on January 14, 2016. Post the adoption of the 2016 Model, 58 notices were issued by India to terminate BITs citing a renegotiation of the former BITs on the basis of the 2016 Model.\textsuperscript{11} The underlying objective of India’s 2016 model is apparent with the stark difference from its previous 2003 model. The new model was meticulous and proposed to reduce the scope of arbitral discretion with narrow, unambiguous provisions. The ensuing part of the paper briefly covers the most noteworthy inclusions in the 2016 Model.

\textbf{i) Definition of investment}

The definition of an investment has a substantial role in determining the extent of rights and obligations under a treaty as well as in establishing jurisdiction of an Investor-State Dispute Settlement (ISDS) tribunal.\textsuperscript{12} The 2016 Model BIT deviated from the wider ‘asset based’ definition which existed in former Indian BITs and instead included an ‘enterprise based’ definition of investment. The BIT defines investment as an enterprise that is constituted, organized and operated in good faith by an investor in accordance with the laws of the host state and possessing characteristics of an investment. It further lists out a non-exhaustive list of assets an enterprise may possess and also includes a negative list for the purpose of greater clarity.

The definition also includes the qualifier of \textquote{being significant for the development} of the party. It has been argued that the usage of the aforesaid term in the definition defeats the tribunals purpose of curbing arbitral discretion and instead leaves much to interpretation.\textsuperscript{13} For example, the requisite of the investment \textquote{being significant} for development, has had differing interpretations from tribunals. Ranging from tribunals suggesting the investment contributing in one way or the

\begin{footnotesize}
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  \item \textsuperscript{12} Mavluda Sattorova, \textit{Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond}, 2 Asian J. Int. Law 267–290 (2012).
  \item \textsuperscript{13} Ranjan, \textit{supra} note 10, at 21.
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other is enough, to suggesting that the contribution must be “significant”. The subjective nature of the term does not permit a uniform interpretation and can prove to be counterintuitive to India's objective of reducing arbitral discretion.

ii) Most Favoured Nation

The MFN clause guarantees that the host state provides foreign investors with a level-playing field thereby precluding it from engaging in discriminatory practices among foreign investors. The MFN clause ensures that a foreign investor is accorded the same or no less favourable treatment than that accorded to another foreign investor. Prior to the introduction of the 2016 Model BIT, a study provided that 76 of the 79 Indian BITs examined included an MFN clause signifying that the incorporation of an MFN clause in a BIT was considered good practice.

However, in tracing the path from the 2003 to the 2016 BIT model it can be observed that India’s stance on MFN clauses has changed. This can be credited to the decision and the usage of the MFN provision in the White Industries case. In the aforementioned case, the tribunal found that India was in violation of its obligation to provide the Australian investor, WI, with the effective means standard in its BIT. Originally, the effective means standard was not applicable to Australian investors as it found no mention in the India-Australia BIT. The Australian investor relying on the MFN clause in the India-Australia BIT argued for the importation of the effective means standard from the India-Kuwait BIT. India contended that such an importation would subvert the carefully negotiated balance of the India-Australia BIT and would be contrary to the

15 Malaysian Historical Salvors v. Malaysia, ICSID Case No ARB/05/10, Award on Jurisdiction, ¶124 (May 17, 2007).
16 Prabhash Ranjan, Most favoured nation provision in Indian bilateral investment treaties: A case for reform, 55 IJIL 1, 1-5 (2015).
18 Ranjan, supra note 16, at 7.
19 White Industries, supra note 8.
20 Id., ¶ 16.1.1(a).
21 Id., ¶ 4.4.6.
intention of the relevant parties at the time of the negotiation of the BIT. The tribunal held that the importation of such a substantive provision in the India-Australia BIT serves the purpose for which the MFN clause has been incorporated in the BIT and that India was obliged to pay USD 4.08 million as compensation to WI. At the 2014 UNCTAD’s World Investment Forum, India stated that the MFN clause in Indian BITs which offered foreign investors the opportunity to borrow beneficial substantive and procedural provisions from third country BITs to replace or supplement the provisions in the primary BIT were vague and disadvantageous as they disturbed the strategic, diplomatic and political motivations behind the negotiations of bilateral treaties.

The presence of an MFN clause may result in host states extending exclusive benefits offered to a foreign investor to third parties with MFN clauses in their treaties which the host state might have intentionally omitted on account of development policies, party autonomy or other reasons. To circumvent the potential of a decision like White Industries in the future, the 2016 Model BIT does not contain an MFN provision. The exclusion of the MFN clause in the 2016 Model signifies India’s conscious departure from this standard treaty practice and the adoption of a protectionist policy which is detrimental to the interests of foreign investors. The absence of an MFN clause exposes foreign investors to the likelihood of discriminatory treaties by the host state as the host state could offer one foreign investor preferential treatment under a BIT without offering the same to another foreign investor. Additionally, host states could offer preferential treatment to a foreign investor with regards to application of domestic measures and regulations and withhold such treatment to another foreign investor. The Law Commission of India in its 260th Report stated that the absence of an MFN clause creates an imbalance between investment protection and regulation. It suggested that this imbalance could be rectified by adopting an MFN

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22 White Industries, ¶ 11.2.1.
23 Id., ¶ 11.2.4.
24 Prabhash Ranjan and Pushkar Anand, supra note 10, at 17.
25 Id. at 24.
26 Jarrod Hepburn and Ridhi Kabra, India’s new model investment treaty: fit for purpose?, 1(2) Indian L. Rev. 1, 3-5 (2017).
28 Id. at 25.
provision with restricted scope which ensures non-discriminatory treatment and prevents foreign investors from ‘treaty shopping’.\(^{30}\)

iii) Fair and Equitable Treatment

FET has emerged as an indispensable standard of International Investment Agreements (IIA). Featuring in a majority of BITs, less than 5 percent of BITs exclude formal and binding FET obligations for host states.\(^{31}\) Through the years it has been consistently and successfully relied upon for IIA claims by investors.\(^{32}\) FET does not possess a conventional interpretation that can be unanimously applied.\(^{33}\) The ambiguity of the same is heavily subject to the interpretation of tribunals. Therefore, the unsettled nature of FET across BITs has manifested in differing legal interpretations.\(^{34}\) India’s statement at UNCTAD’s 2014 World Investment Forum specifically alluded to the ambiguity of the FET provision in India’s 2003 Model BIT.\(^{35}\) India’s approach to a FET provision in the 2016 Model BIT thus intended at an unmistakable interpretation which would reduce arbitral discretion. Owing to this, the 2016 Model BIT does not include a FET provision and instead includes a provision entitled ‘Treatment of Investments’ under Article 3.1.

There are two major interpretations of FET; either it being an autonomous standard or an international minimum standard of treatment which is accorded under customary international law. The 2016 provision limits the violations under customary international law by prohibiting the investor from subjecting investments to measures that entail denial of justice, breach of due process, targeted discrimination and manifestly abusive treatment. Treaty practice indicates that countries excluding a FET obligation, do so with the purpose of avoiding exposure to a wide,

\(^{30}\) Id.; UNCTAD, Most Favored Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II, ¶ 60, 111 (2010).


\(^{33}\) Stephan Schill, The Multilateralization of International Investment Law 93 (CUP 2009).

\(^{34}\) August Reinisch, The Future of Investment Arbitration, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 905 (Christina Binder et al. eds., 2009).

\(^{35}\) Ranjan supra note 10, at 17.
unfettered standard of protection to the investors.\(^\text{36}\) Thus, by excluding the ambiguous title of FET and limiting the breaches under customary international law the 2016 Model aims to limit this scope of protection.

The reform in the 2016 Model has been praised\(^\text{37}\) but, the phrasing of the provision has also been subject to criticism. Mainly pertaining to the exclusion of ‘manifest arbitrariness’ and the watered-down formulation of ‘legitimate expectations’.\(^\text{38}\) This in turn places the host state on a higher footing as compared to the investor.

**iv] Expropriation**

A large number of disputes under BITs revolve around actions of the host state which involves them taking some form of the foreign country’s investment which is also known as expropriation. Article 5.3 (a)(i) and article 5.3(a)(ii) of 2016 Model BIT provide for both direct as well as indirect expropriation respectively. Direct expropriation constitutes the nationalization of an investment, formal transfer of title or seizure of the investment by the host state.\(^\text{39}\) Indirect expropriations are discrete in nature and constitute measures by the host state which would either substantially or permanently deprive an investor of the fundamental properties of his investment such as the right to use, enjoy and dispose the investment without formally executing a transfer of the title or without an outright seizure by the host state.\(^\text{40}\) To determine whether there has been an indirect expropriation by the state factors such as economic impact, duration and character of the measure are to be considered.\(^\text{41}\) Most tribunals rely on the economic impact of the measures taken by the host state on the investment to determine expropriation. However, the 2016 Model BIT

\(^{36}\) UNCTAD *supra* note 32, at 20.


\(^{40}\) Indian Model BIT, *supra* note 39, at art. 5.3 (a)(ii).

\(^{41}\) Indian Model BIT, *supra* note 39, at art. 5.3 (b).
provides that expropriation cannot be determined on the sole grounds that the measure caused an adverse economic impact on the investment.\textsuperscript{42} The 2016 Model BIT provides that factors which relate to the character, object and intent of the measure have to be given due weightage in determination of expropriation.\textsuperscript{43} Furthermore, the Model states that non-discriminatory regulatory measures as well as awards by judicial bodies in order to safeguard legitimate public interests or public purpose objectives do not constitute expropriation.\textsuperscript{44} An analysis of factors such as the economic impact and duration of a measure by a host state constitute an effect based enquiry into actions which may result in indirect expropriation.\textsuperscript{45} However, factors such as character, object, intent of the measure and the right to adopt regulatory measures in the interest of the public delve into an intent-based enquiry and provide excessive opportunities to the host state to adopt measures which may lead to indirect expropriation.\textsuperscript{46} Apart from the regulatory measures being non-discriminatory in nature, the 2016 Model BIT does not place any restrictions on the validity of these measures thereby providing a deferential standard of review favouring the host state.\textsuperscript{47} Article 5 of the Model BIT allows the state to lawfully expropriate foreign investments subject to three conditions viz. a public purpose, compliance with due process of law and payment of adequate compensation.\textsuperscript{48} Non-discrimination as a condition to lawful expropriation, which is customarily present in investment treaties, has been omitted which implies that an expropriation will not be in breach of the Model BIT notwithstanding the fact that it deliberately targets investments owned by a particular country, race, religious or ethnic group.\textsuperscript{49} This omission restricts the scope for expropriation claims in comparison to other BITs as well as customary international law. The Model BIT further mandates that before considering the alleged claim of expropriation, the tribunal must consider whether the aggrieved party pursued local remedies against the expropriation prior to approaching the tribunal.\textsuperscript{50} This provision places a significant challenge before foreign investors who wish to challenge the measures resulting in the alleged expropriation.

\textsuperscript{42} Nishith Desai Associates, \textit{supra} note 38, at 23.
\textsuperscript{43} Id.
\textsuperscript{44} Indian Model BIT, \textit{supra} note 39, at art. 5.5.
\textsuperscript{45} Nishith Desai Associates, \textit{supra} note 38, at 23.
\textsuperscript{46} Nishith Desai Associates, \textit{supra} note 38, at 23.
\textsuperscript{47} Indian Model BIT, \textit{supra} note 39, at art. 23.1.
\textsuperscript{48} Indian Model BIT, \textit{supra} note 39, at art. 5.
\textsuperscript{49} AUGUST REINISCH, LEGALITY OF EXPROPRIATIONS, IN STANDARDS OF INVESTMENT PROTECTION (OUP 2008).
\textsuperscript{50} Indian Model BIT, \textit{supra} note 39, at art. 15.1.
The expropriation provisions of the 2016 Model BIT are tilted in favour of the host states as the character, object and intent of the measures take precedence over the effects of these measures on foreign investment thereby prioritizing the regulatory powers of the State over the protection of foreign investment.

v] Dispute Resolution

a] Investor State Dispute Settlement

ISDS is an essential component in BITs as it certifies protection for the investor by permitting the investor to bring a claim against the host state.\(^{51}\) The ISDS are often all encompassing, thereby including not only treaty breaches but also contractual breaches.\(^{52}\) This provision termed as an ‘umbrella clause’ expands the scope of protection accorded to the investor through a broadly worded provision and upholds every possible obligation the host state may have. Thus, widening the possibility of pursuing a claim by effectively elevating a contractual claim to a treaty claim. The 2016 Model BIT does not contain an umbrella clause and limits the jurisdiction of an ISDS tribunal by specifically excluding breaches which arise solely out of the breach of contract. Under Article 13.3 a contractual breach must be resolved by the domestic courts or as per dispute resolution provisions set out in the contract.

The 2016 Model BIT further curbs the jurisdiction of ISDS, by limiting its scope only to disputes that arise out of obligational breaches under “Chapter II: Obligations of Parties”.\(^{53}\) However, “Article 9: Entry and Sojourn of Personnel” and “Article 10: Transparency” under this chapter are excluded. The BIT also imposes jurisdictional limits by not permitting an ISDS tribunal


\(^{52}\) Kenneth J. Vandeveld, Bilateral Investment Treaties: History, Policy, and Interpretation 453 (OUP 2010).

\(^{53}\) Indian Model BIT, supra note 39, at art. 13.2.
to adjudicate upon any claim which has been subject to arbitration under Chapter V\textsuperscript{54} and further exempts these tribunals from reviewing merits of domestic judicial decisions.\textsuperscript{55}

b] Exhaustion of Local Remedies

The Exhaustion of Local Remedies (ELR) is a long-standing principle of customary international law.\textsuperscript{56} The objective of ELR is to provide redressal to a foreign investor’s claim in the domestic courts of the host state before pursuing remedies in international courts. Although the express requirement of ELR isn’t a common practice among BITs\textsuperscript{57}, the 2016 Model BIT explicitly requires ELR.\textsuperscript{58} It requires foreign investors to exhaust local remedies for a period of 5 years before international arbitration can commence and the 5 years are to be calculated from when the “investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.” In order to ensure a strict application of ELR, the BIT further states that the investor cannot evade this obligation by asserting that the claim under the treaty is by a different party or in respect of a different cause of action.

If the investor does not wish to pursue remedies in domestic courts, there exists the ‘futility clause’.\textsuperscript{60} However, this can be availed only if the investor can successfully prove the non-existence of remedies in domestic courts. This aligns with previous interpretations of tribunals where ELR was set aside “when investors proved with success that domestic remedies served no significant purpose, enforced a considerable burden on the investor or caused substantial delays.”\textsuperscript{61} If after the period of 5 years ELR does not result in an outcome acceptable to the

\textsuperscript{54} Indian Model BIT, supra note 39, at art. 13.5 (ii).
\textsuperscript{55} Indian Model BIT, supra note 39, at art. 13.5 (i).
\textsuperscript{56} ANDREW NEWCOMBE AND LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 6 (Kluwer Law International 2009).
\textsuperscript{58} Indian Model BIT, supra note 39, at art. 15.
\textsuperscript{59} Indian Model BIT, supra note 39, at art. 15.1.
\textsuperscript{60} Indian Model BIT, supra note 39, at art. 14.3 (ii) b.
\textsuperscript{61} Martin Brauch, supra note 57, at 20.
investors, the BIT prescribes two further qualifiers before one can engage in ISDS. These include (i) filing a notice of dispute and (ii) fulfilling additional conditions which are precedent pertaining to the timing of the claim. The limiting and multiple qualifications in the Model BIT could prove to be an impediment for the investor to settle a claim through the ISDS mechanism. Considering the backlog and limitation periods accompanying India's judicial framework, this clause has rightfully been subject to criticism for not being investor friendly.

vi] Non-Precluded Measures or General Exceptions

The contracting states in a BIT may agree to provisions which provide regulatory freedom to the states to take necessary measures in order to safeguard national interests knowing that it may even result in expropriation of a foreign investment or in violation of the BIT’s standards of protection. Most BITs provide for non-precluded measures (NPM) clauses which preclude host states from any liability on account of measures taken in exceptional circumstances to protect national interests. NPM clauses transfer the risk and costs of the state’s actions from the host state to foreign investors and allow the non-investment policy objectives of the host state in certain circumstances to take precedence over obligations without attracting any liability under international law. NPM provisions comprise two main elements viz. permissible objectives and nexus requirement. Permissible objectives are those objectives provided for in NPM clauses on the basis of which the host states can deviate from their treaty obligations. Nexus refers to the correlation between the policy measures enacted by the host state and the permissible objective sought to be achieved through it. The 2016 Model BIT has a chapter which exclusively covers general as well as security exceptions and Article 32 provides general exceptions along with

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62 Indian Model BIT, supra note 39, at art. 15.2.
63 Indian Model BIT, supra note 39, at art. 15.5.
64 Prabhash Ranjan and Pushkar Anand, supra note 10, at 51; Jarrod Hepburn and Ridhi Kabra, supra note 26, at 18; Ranjan, supra note 4, at 29.
65 Prabhash Ranjan, Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation, 2 Asian J. Int. Law 21 (2012); Prabhash Ranjan, supra note 6, at 19.
66 Indian Model BIT, supra note 39, at art 32.
67 ANDREW NEWCOMBE, SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW (Kluwer Law International 2010); Nishith Desai Associates, supra note 37, at 35.
68 Ranjan, supra note 65.
69 Prabhash Ranjan and Pushkar Anand, supra note 10 at 41.
permissible objectives. The NPM provisions contain ‘necessary’ as the sole nexus requirement for permissible objectives. Footnote 6 in the 2016 BIT model provides guidance to the tribunals in determining whether a measure is ‘necessary’. In order to determine whether a measure is necessary, the tribunal must consider whether there existed no less restrictive alternative measures within reason available to the host country. The specification of the meaning of ‘necessary’ in the Model BIT has reduced arbitral discretion and ensured adequate protection of foreign investment as only the least restrictive measures available are permitted to be adopted. The incorporation of a large number of permissible objectives in the Model BIT proves that India is a ‘rule-maker’ in composing general exceptions which balance both investment protection as well as the host state’s regulatory powers.

The NPM provisions in the 2016 Model BIT have been well drafted to cover a wide ambit of general and security exceptions. Article 33.1 (ii) states that no party to a treaty will be prevented from taking actions it considers necessary to protect their essential security interests. However, Article 33.1 (ii) furnishes only an indicative list of what a state could constitute as essential security interests thereby enabling the host state to interpret this article in its favour. The lack of a chapeau as found in Article XX of General Agreement of Tariffs and Trade creates a textual loophole in Article 32. The presence of a chapeau as found in Article XX helps prevent abuse of the ambiguity in the provisions by the host state who may engage in regulatory abuse. The inclusion of the chapeau would have guaranteed that the measures adopted by the host states would not result in a misuse or abuse of the NPM clauses. At present the only requirement for the application of NPM clauses is that the measures should not be applied on a discriminatory basis. To ensure that host states do not exploit their regulatory freedom, the NPM provisions should as a measure of good practice contain a chapeau similar to the one provided in Article XX of the GATT which states that there shall be no arbitrary discrimination or disguised restriction in the application of

70 Id.  
71 Indian Model BIT, supra note 39, at art. 32.1.  
72 Indian Model BIT, supra note 39, at footnote to art. 32.1.  
73 Prabhash Ranjan and Pushkar Anand, supra note 10, at 43.  
74 Prabhash Ranjan and Pushkar Anand, supra note 10, at 43.  
75 Prabhash Ranjan and Pushkar Anand, supra note 10, at 43.  
NPM clauses. The absence of such a chapeau tilts the nature of the Model BIT in the favour of the host state.

vii] Taxation

Article 2.4 (ii) of the 2016 Model BIT states that the BIT shall not apply to any law or measure concerning taxation which includes measures taken for the enforcement of taxation obligations.77 Article 2.4 (ii) further states that if the host state decides that the conduct alleged as a breach of treaty obligations is a subject matter related to taxation, either before or after the commencement of arbitration proceedings, then this decision of the host state is non-justiciable and no arbitration tribunal can review this decision.78 The decision to remove taxation measures from the purview of future BITs is a response to the claims raised by the parties in the Vodafone79 and Cairn80 cases challenging the retrospective application of India’s taxation laws. The complete exclusion of taxation measures renders foreign investors incapable of challenging any form of taxation measures under BITs in any circumstance.81 Furthermore, granting host states complete and unfettered discretion to identify a regulatory matter as a taxation measure may result in regulatory abuse.82 The decision of the tribunal in EnCana v. Ecuador83 recognized that the capacity of a state to abuse their taxation power by creating taxation laws which may be extraordinary, punitive or arbitrary could result in an indirect expropriation claim.84 Article 6.3 specifies interventions accepted by the host state to restrict the right of a foreign investor to freely transfer investment related funds.85 Article 6.3 (vi) allows the host state to condition or prevent transfer of funds by a foreign investor through a good faith application of its taxation laws.86 The absolute exclusion of taxation measures by the host state from arbitral review as well as unfettered

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77 Indian Model BIT, supra note 39, at art. 2.4 (ii).
76 Indian Model BIT, supra note 39, at art. 2.4 (ii).
79 Vodafone International Holdings BV v. Union of India, 6 SCC 613 (2012).
81 Ranjan, supra note 4, at 35.
82 Prabhash Ranjan and Pushkar Anand, supra note 10, at 44.
83 EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, Award, (Feb.3, 2006).
84 Id. ¶ 177.
85 Indian Model BIT, supra note 39, at art. 6.3.
86 Indian Model BIT, supra note 39, at art. 6.3 (vi).
discretion to prevent free transfer of funds on account of taxation laws leaves foreign investors vulnerable to exploitation by the host states.

III. The departure from the 2016 Model with the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India 2020

Subsequent to the 2016 Model BIT, India executed BITs with Belarus,87 Kyrgyz Republic,88 and Taiwan.89 Its most recent BIT was with Brazil in January 202090 which is Brazil’s 10th Investment Treaty. In its prevailing 9 treaties Brazil restructured its approach to conventional BITs with Cooperation and Facilitation Agreements (CIFA). The aim with CIFAs was promotion of investments and amicable dispute resolution as opposed to the relatively aggressive frameworks of traditional BITs. This aim is also reflected to a considerable extent in the Investment Cooperation and Facilitation Treaty (ICFT) between the Federative Republic of Brazil and the Republic of India. The subsequent part of this paper will delve into a critical analysis of the salient features of the ICFT which to some extent depart from the framework of the Brazilian and Indian Model BITs.

i) Definition of Investment

The ICFT includes a narrow enterprise-based definition of investment much like the Indian Model BIT. Although Brazil has signed treaties with a wider asset-based definition,91 it favours

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87 Treaty between the Republic of Belarus and the Republic of India on Investments, Sep. 24, 2018 [hereinafter Belarus- India BIT].
89 Bilateral Investment Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India, Dec. 18, 2018 [hereinafter Taiwan- India BIA].
the 2016 Indian Model in this respect. The definition is primarily similar to the 2016 Model but varies on some aspects. The most significant being excluding the qualifier of an investment being “significant for the development of the Party in whose territory the investment is made”. As noted previously, the equivocal complexion of this term would lead to arbitral discretion and was justly subject to criticism when included in the 2016 Model.92 The other variation includes the exclusion of two assets which an enterprise can possess, they are (i) “rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the law of a Party” and (ii) “any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value.”93 The exclusion of these two assets further narrows the definition of an investment. While the definition clause does mirror the 2016 Model to a greater extent, it does borrow the phrase “significant degree of influence” from previous Brazil CIFAs.94 The negative list of the ICFT is akin to the 2016 Model, thus further alluding to the stronger presence of India’s model definition.

ii] Most Favoured Nation

As mentioned above, the inclusion of an MFN clause is a standard procedure followed by most countries while entering into a BIT to ensure that the foreign investor is provided the same or no less treatment than another investor.95 However, owing to the role played by the MFN clause in the arbitral decision in the White Industries96 case, India has been strongly opposed to the inclusion of MFN clauses in BITs. Article 6 of the Brazilian Model BIT provides for an MFN clause; however, Brazil conceded to the explicit exclusion of the MFN clause in the ICFT in accordance with the 2016 Indian Model BIT.97

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92 See supra text accompanying note 15.
93 ICFT, supra note 90, at art 2.4.
94 Cooperation and Investment Facilitation Agreement Between the Federative Republic of Brazil and The United Arab Emirates, art. 1.3, Mar. 15, 2019; Cooperation and Investment Facilitation Agreement Between the Federative Republic of Brazil and the Co-operative Republic of Guyana, art. 1.3, Dec. 13, 2018.
95 Ranjan, supra note 16, at 7.
96 White Industries, supra note 8.
Non-discriminatory clauses in BITs provide protection to investors from any losses which they may incur due to war, armed conflicts, revolution, civil strife, national emergency, etc.\(^{98}\) In the event that any damage is caused to the foreign investment due to the aforementioned reasons the host state is obliged to compensate the foreign investors. Article 7 of the ICFT provides for compensation of losses to foreign investors in the form of restitution, indemnification, etc. However, article 7 of the ICFT is attached with an MFN clause. The presence of the MFN clause in article 7 allows the investors affected the option to adopt the most favourable treatment which is awarded by the host state to its own investors or to third party investors.\(^{99}\) The Indian Model BIT offers similar treatment to its investors through the National Treatment clause in article 4 while the Brazilian Model BIT provides it explicitly through an MFN clause. Therefore, while an explicit MFN clause is absent in the ICFT, the language of article 7 of the ICFT proves that India once again conceded to Brazil by subtly adopting an MFN clause although such attachment is normally considered standard protocol by investment lawyers.\(^{100}\)

iii] Treatment of Investments

India’s stand on FET is clear owing to the exclusion of the clause from the 2016 Model. Brazil excluded FET in its previous CIFAs and thus there is an unsurprising exclusion from the ICFT as well. It instead includes a provision titled ‘Treatment of Investments’ under Article 4. This provision is largely analogous to the namesake provision of the 2016 Model BIT. Similar clauses from the 2016 model include protection against measures constituting denial of justice, breach of due process, targeted discrimination, manifestly abusive treatment, and discrimination in matters of law enforcement. All of the provisions under this article would be applied as per customs of international law mutually recognized by the parties as well as their respective national law.

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\(^{98}\) Brauch, *supra* note 97.


The two diverging clauses from the Model BIT is one, a clause that makes it obligatory for parties to provide facilities and necessary permissions for the entry, exit, residence and work of the investor or a national of the other party who has a temporary/ permanent relationship with the investment.101 The second noteworthy inclusion in the ICFT is Article 4.2 which states, “Nothing in this Treaty shall be construed as to prevent a Party from adopting or maintaining affirmative action measures towards vulnerable groups”. Affirmative action-based measures have been previously challenged in 2009 when Italian Investors claimed South Africa’s affirmative action policies expropriated their mineral rights.102 Similar policies in Malaysia also proved to be a hindrance in treaty negotiations.103

A United Nations High Commissioner for Human Rights Report indicated that interpretation of investment treaties by arbitral tribunals could prove detrimental to states honouring their human right obligations.104 The inclusion of this clause in the ICFT thus safeguards the parties obligations to protect vulnerable groups and allows the states to do so without dwelling about tribunal misinterpretation. Affirmative action clauses have been featured in investment treaties105 and are also grounded in international human rights obligations.106 Reference to human rights in investment treaties are a rare occurrence. A fact-finding survey reviewed 2000 investment treaties and found a reference to human rights in only 0.5 percent of the treaties.107 Further, this clause is particularly notable because the ‘Treatment of investments’

101 ICFT, supra note 90, at art 4.4.
102 Piero Foresti, Ida Laura De Carli, Dora Foresti, Maria Teresa Suardo, Paola Suardo, Antonio Foresti, Luigi Foresti, Massimiliano Foresti, Franca Conti, Daniela Conti, Finstone s.à.r.l v. Republic of South Africa, ICSID Case No ARB(AF)/07/1, Award (Aug. 4 2010).
clause in India’s previous BITs were completely identical to the 2016 Model. The inclusion of the clause in the ICFT is an appreciable measure towards establishing a tandem between human rights and international investment treaties.

iv) Expropriation

Direct expropriations of foreign investments in the modern investment era have become a rare occurrence having been replaced by indirect expropriations which occur discreetly leaving the title to the investments unaffected. Article 5.3 of the 2016 Indian Model BIT, albeit a host-centric provision, protects foreign investments from indirect expropriation in addition to providing means to identify if an investment has been indirectly expropriated.\(^{108}\) However, protection of foreign investments from indirect expropriation is beyond the ambit of the ICFT.

Article 6.3 of the ICFT explicitly excludes indirect expropriation from its purview\(^{109}\) which is consistent with the Brazilian Model BIT. As suggested by the heading of article 6 in the ICFT, article 6.1 only prohibits direct expropriation in the form of nationalization, formal transfer of title and downright seizure by either party unless for reasons of public purpose, in a non-discriminatory manner or on payment of effective and adequate compensation in accordance with due process of law.\(^{110}\) Post 2015 all Brazilian BITs explicitly exclude indirect expropriation due to the belief that provisions on indirect expropriation allow foreign investors to raise claims against indirect expropriation on imperceptible grounds.\(^{111}\) Brazil has been critical of indirect expropriation provisions in BITs as it allows claims by foreign investors which circumscribe the regulatory capacity of host states in protecting public interests viz. public health, environment and public security.\(^{112}\)


\(^{110}\) ICFT, *supra* note 90, at art. 6.1.

\(^{111}\) Sarkar, *supra* note 100.

\(^{112}\) Ranjan, *supra* note 108.
India has signed two BITs with Belarus\textsuperscript{113} and Taiwan\textsuperscript{114} since the adoption of the 2016 Model BIT which protects foreign investments against direct as well as indirect expropriations. Article 5.3A of the India-Belarus BIT not only provides rules against indirect expropriation but also provides guidance to investment tribunals in determination of indirect expropriation.\textsuperscript{115} India’s sudden departure from its rules on indirect expropriation is indicative of the compromise arrived at by the two countries during the negotiation of the ICFT which favoured the principles of the Brazilian Model BIT. The absence of indirect expropriation provisions may result in abuse of regulatory behaviour by the host state which may negatively impact foreign investments, result in imposition of inadequate costs on foreign investors in pursuance of public interests or expropriate investments in a manner which does not fall within the purview of direct expropriations.\textsuperscript{116} The presence of a provision on indirect expropriation may be exploited by foreign investors; however, its complete exclusion creates a lacuna weakening the protection of foreign investment.

\textbf{v) Dispute Resolution}

Claims under ISDS clauses have been on a rising trajectory through the years.\textsuperscript{117} Perhaps alluding to the purpose of the ICFT moving away from an ISDS clause and instead only covering State-State Dispute Settlement (SSDS), with its main focus on prevention of a dispute.\textsuperscript{118} Although India’s 2016 Model has an ISDS option it is strictly prefaced with the Exhaustion of Local Remedies Clause. On the other hand, as is apparent in its prevailing practice Brazil is explicitly against an ISDS mechanism. Since 2014 it has not included an ISDS clause in any of its treaties and instead caters to a tiered dispute prevention mechanism via a joint committee and SSDS as a fallback recourse.\textsuperscript{119} The ICFT clearly tilts towards the Brazil CIFAs in this respect.

\textsuperscript{113} Belarus- India BIT, \textit{supra} note 87.
\textsuperscript{114} Taiwan- India BIA, \textit{supra} note 89.
\textsuperscript{115} Sarkar, \textit{supra} note 100.
\textsuperscript{116} Ranjan, \textit{supra} note 108.
\textsuperscript{118} ICFT, \textit{supra} note 90, at part IV.
The objective of the clause is apparent with its phrasing; titled ‘Dispute Prevention Procedure’. Although the treaty entails a SSDS mechanism, in the occasion of an alleged breach the alleging party must first initiate the dispute prevention procedure by submitting a written request to the Joint Committee addressing the concerned breach. Article 13.4 (e) confers upon the Joint Committee a responsibility to “…resolve disputes concerning investments of investors of a Party in an amicable manner”. Further alluding to the BIT’s objective of dispute prevention through a relatively passive medium. Only if the Joint Committee fails to conclusively resolve the dispute can the parties submit to SSDS under Article 19.

While India’s previous BITs with Belarus\textsuperscript{120}, Taiwan,\textsuperscript{121} and Kyrgyz Republic\textsuperscript{122} include dispute resolution clauses akin to India’s Model BIT which cover exhaustion of local remedies, stringent time limits for the submission of claims, ISDS mechanism, limited potential areas of breach and jurisdiction of the tribunal, the ICFT has clearly shifted away from India’s 2016 Model. However, this approach still aligns with the attempts of numerous treaties to reform the ISDS clause.\textsuperscript{123} The usage of SSDS is contentious, while some argue that it “re-politicises” investment disputes, there also exists the view of it benefitting the state’s abilities to “re-engage with the investment treaty system”.\textsuperscript{124} The SSDS mechanism in the ICFT is further limited, by depriving the tribunal of the power to award compensation.\textsuperscript{125} Compensation from ISDS claims prove to be exorbitant for developing countries.\textsuperscript{126} Considering, India formulated the 2016 Model pursuant to the White Industries award,\textsuperscript{127} this novel approach of avoiding monetary compensation coupled with a framework to prevent dispute may prove to ameliorate India’s long-standing interests.

\textsuperscript{120} Belarus- India BIT, \textit{supra} note 87, art. 15.
\textsuperscript{121} Taiwan- India BIA, \textit{supra} note 89, art. 15.
\textsuperscript{122} Kyrgyz Republic- India BIT, \textit{supra} note 88, art. 15.
\textsuperscript{123} UNCTAD, REFORMING INVESTMENT DISPUTE SETTLEMENT: A STOCKTAKING, IIA ISSUES NOTE: INTERNATIONAL INVESTMENT AGREEMENTS, UNCTAD/DIAE/PCB/INF/2019/3 (2019).
\textsuperscript{125} ICFT, \textit{supra} note 90, at art 19.2.
\textsuperscript{127} See \textit{supra} text accompanying note 10.
VI] General and Security Exceptions

Most provisions of the ICFT depart from the provisions of the Brazilian Model BIT and the Indian Model BIT. Despite the inherent differences the General and Security Exceptions clauses in the ICFT draws heavily from the Indian Model BIT. Article 23.1 in the Brazilian Model BIT as well as article 33.1 in the Indian Model BIT provide General Exceptions clauses, the ICFT also includes such exceptions in article 23.1 which is a heavy reproduction of the clauses provided in article 33.1 of the Indian Model BIT. Similarly, article 24 of the ICFT which covers Security Exceptions almost replicates article 33 of the Indian Model BIT in its entirety with a minor alteration in article 24.3. Thus, while most provisions of the ICFT rely heavily on the Brazilian Model BIT, certain facets of the Indian Model BIT do find a place in the ICFT.

VII] Taxation

As seen with the General and Security Exceptions, the taxation clauses in the India-Brazil BIT bear some semblance to the Indian Model BIT with a minor variation. Article 2.4 (ii) of the Indian Model BIT states that any regulatory measures relating to taxation by the host state would be beyond the purview of the BIT and the decision of the host state that the regulatory measure relates to taxation shall be final and non-justiciable. Similarly, article 20.3 of the ICFT places taxation related regulatory measures beyond the scope of the BIT. However, article 20.3 of the ICFT differs from article 2.4(ii) of the Indian Model BIT as it does not state that taxation related regulatory measures will be non-justiciable. Bringing taxation related measures within the jurisdictional capacity of arbitration tribunals grants foreign investors the right to challenge the impugned measures and prevents host states from abusing their regulatory powers. Once again, this departure from the taxation related provisions in the Indian Model BIT speaks volumes of the compromise arrived at between the two states during the negotiation of the ICFT.

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128 Brauch, supra note 97.
129 Sarkar, supra note 100.
130 Indian Model BIT, supra note 39, at art. 2.4 (ii).
131 ICFT, supra note 90, at art. 20.3.
IV. Conclusion

India’s previous BITs with Belarus, Taiwan and Kyrgyz Republic are exceedingly modeled after its 2016 Model which was contrived as a means to protect the interests of the host state over the interests of foreign investors. However, the provisions of the ICFT show a clear departure from the Indian Model BIT and showcase the compromise arrived at between the two countries. The provisions of the ICFT, as seen above, tilt more in favour of the Brazilian Model BIT. By opting for an ICFT model which favours investment facilitation over protection, India has left its foreign investments vulnerable to regulatory abuse by Brazil.

India has gone against its precedent of adopting provisions which are host-centric and has even ventured into unorthodox approaches to customary BIT provisions. The dispute prevention procedure, reference to affirmative action measures, exclusion of indirect expropriation claims, the subtle presence of an MFN clause in article 7, the justiciability of taxation-related regulatory measures are indicative of the novel approaches adopted by the ICFT. It is pertinent to note that presently Brazil has no reported investment disputes, whereas India is currently subject to 11 investment disputes.

In 2019 India was listed as one of the top ten recipients of foreign investments and was for the third year in a row one of the top ten countries in the world which improved in the World Bank’s Doing Business report.132 India also reported a 13% increase in foreign direct investment in 2019-20.133 The last decade has seen India become a hub for development in various facets facilitating an increase in foreign investments. Given India’s arbitral track record, the formulation of an unassailable BIT which safeguards India’s interests is the need of the hour. Perhaps, the adoption of these novel approaches mirroring Brazil’s model may fare well for India. However, the adoption of this hybrid ICFT poses a difficult conundrum; will future Indian BITs emulate the

Indian Model, or will we observe scrupulously negotiated BITs entailing an amalgamation of various BIT models.